

European Court upholds criminal conviction for purchasing illegal firearm as a form of ‘check it out’ journalism in [*Salihu a.o. v. Sweden*](#)

by Dirk Voorhoof and Daniel Simons

Investigative journalism sometimes operates at the limits of the law. This is especially true of what could be called ‘check it out’ journalism: reporting in which a journalist tests how effective a law or procedure is by attempting to circumvent it. A recent decision shows that those who commit (minor) offences during this type of newsgathering activity cannot count on (major) support from the European Court of Human Rights (ECtHR). Journalists of the Swedish newspaper *Expressen* had undertaken to demonstrate the easy availability of illegal firearms by purchasing one. The Swedish courts were of the opinion that the editor and the journalists could not be exempted from criminal liability as they had wilfully breached the Swedish Weapons Act. In a unanimous decision, the ECtHR confirmed the necessity of the journalists’ criminal conviction. It declared the application for alleged breach of the right of journalistic newsgathering under Article 10 of the Convention manifestly ill-founded. Coming after the Grand Chamber’s judgment in [*Pentikäinen v. Finland*](#) (see our blog [here](#)) and in [*Bédat v. Switzerland*](#) (see our blog [here](#)), the decision in *Salihu and others v. Sweden* can be perceived as a new step in downsizing the rights of journalists with regard to their newsgathering activities. The Court’s ruling may also have a chilling effect on undercover investigative reporting.

Facts

In 2010, a series of shootings took place in southern Sweden, prompting lively public debate and calls for more stringent firearms control. Thomas Mattsson, Andreas Johansson and Diamant Salihu, the editor-in-chief, news editor and a journalist at the tabloid newspaper *Expressen*, decided to prepare a news story on the easy availability of illegal firearms. They successfully contacted several people who claimed that they could sell them a gun. Salihu went ahead and bought one; a photographer of *Expressen* was present during the transfer, with Johansson listening in via a mobile telephone for safety reasons. On arrival in their hotel, they called the police, photographed the weapon and put it in the hotel room’s security box. They subsequently handed it over to two police officers, half an hour later. The next day *Expressen* published an article portraying the events. The article covered two pages, including a large photograph of the firearm and a description of the contacts leading up to its purchase. Shortly after, the public prosecutor decided to press charges against the journalists, and all three were convicted for (incitement to) a weapons offence.

Criminal conviction for breach of Weapons Act

The District Court found that the journalists had shown clear intent to commit punishable actions, and could not hide behind Article 10 ECHR in this case. It noted that the defendants were not on trial for publishing an article, but for actions taken before the publishing. It also noted that their actions appeared to be premeditated risk-taking to create sensational news. In imposing the sanction, the District Court took into account that the journalists had never intended to use the firearm and that they had contacted the police soon after it was bought. Therefore, the court suspended the sentences and it imposed fines on the journalists. This conviction was upheld by the Court of Appeals. It joined in the lower court’s reasoning and it noted in particular that it had not been necessary for the applicants to complete the purchase of the firearm and to subsequently transport it in order to fulfil their journalistic mission. Their aim – to investigate whether illegal weapons were easily accessible in Sweden – had already been achieved when Salihu received the offer to buy the firearm.

The Supreme Court upheld the journalists' conviction, removing the suspended sentences, but increasing the level of the criminal fines drastically from 30 to 80 day fines, which amounted, in total, to approximately EUR 8,400 for Mattsson, EUR 5,700 for Johansson and EUR 4,400 for Salihu. The Supreme Court emphasized the strong societal interest in controlling the handling of weapons, although it also recognised the journalistic purpose behind the purchase of the firearm. According to the Court, the question whether it was easy to buy weapons could, however, have been illustrated by other means, and the weight of the journalistic interest was not enough to justify completion of the purchase of the firearm. Therefore, there was no bar to convicting the journalists. With regard to the proportionality of the sanction, the Supreme Court noted that the conviction was not for the actual publication of the article, and that the sentences imposed were below those normally prescribed for the crime, in view of the journalistic context and the precautions the journalists had taken after obtaining the weapon. The *Expressen*-journalists finally lodged an application before the ECtHR, complaining that their conviction was unlawful (breach of Article 7) and violated their rights as journalists guaranteed under Article 10 ECHR.

Journalist must obey, in principle, ordinary criminal law

In its unanimous decision of 10 May 2016, the ECtHR dismissed the double complaint. With regard to the alleged violation of Article 10 ECHR, the Court finds that the journalists' convictions were lawful and pursued the legitimate aims of the protection of public safety and prevention of disorder and crime. Regarding the decisive question whether the interference was "necessary in a democratic society", the ECtHR refers to the fundamental principles concerning this question elaborated in some of its Grand Chamber judgments such as [Stoll v. Switzerland](#) and, most recently, [Bédat v. Switzerland](#). Referring to its Grand Chamber judgment in [Pentikäinen v. Finland](#), the Court reiterates that *"notwithstanding the vital role played by the media in a democratic society, journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that, as journalists, Article 10 affords them a cast-iron defence. In other words, a journalist cannot claim an exclusive immunity from criminal liability for the sole reason that, unlike other individuals exercising the right to freedom of expression, the offence in question was committed during the performance of his or her journalistic functions"*.

Turning to the facts, the ECtHR endorses the main arguments developed by the domestic courts: the journalists wilfully infringed ordinary criminal law, they could have illustrated the easy availability of firearms in other ways, and the weight of the journalistic interest did not justify carrying through on the offer to sell a firearm. The ECtHR furthermore observes that the question of the applicants' rights under Article 10 had been the subject of arguments, including during hearings, before all three domestic instances. The domestic courts had stressed the importance of journalists' role in society and made a balanced evaluation of all interests at stake. Taking into account the margin of appreciation afforded to the State in this area, and explicitly referring to the principle of subsidiarity, the ECtHR finds that the reasons relied on by the domestic courts were relevant and sufficient for the purposes of Article 10 of the Convention and that they struck a fair balance between the competing interests at stake. The ECtHR concludes that the domestic courts were entitled to decide that the interference complained of was "necessary in a democratic society". The application is considered manifestly ill-founded and therefore inadmissible.

Comments

The Grand Chamber judgment of the ECtHR in [Fressoz & Roire v. France](#), and later the outcome in [Radio Twist v. Slovakia](#) and [Dupuis v. France](#) have demonstrated that the prosecution and criminal conviction of journalists for breaching national law during the newsgathering process may in certain circumstances constitute a violation of Article 10 ECHR. The decision in [Mikkelsen and Christensen v. Denmark](#)

(purchasing and transport of illegal firework) and the judgment in [Haldimann a.o. v. Switzerland](#) (use of hidden camera) clarified that undercover investigative journalism must respect certain limitations and precautions when breaching the law.

In *Mikkelsen and Christensen v. Denmark*, the ECtHR recognised that the criminal conviction of the applicant journalists for illegally purchasing and transporting a box of fireworks interfered with their rights under Article 10 of the Convention. However, the Court was unconvinced that the purchase was necessary to demonstrate the easy availability of illegal fireworks or to make the applicants' documentary on the subject more credible. They had had access to a number of similar lots of illegal fireworks already seized by the police. Moreover, the rules on the purchase of fireworks were based on compelling safety considerations; the two journalists had failed to take relevant precautions, such as enlisting the help of a certified pyrotechnician. The Government maintained their actions could have had serious consequences if the fireworks had detonated by accident during transportation through the center of Copenhagen. The interference with their rights hence met the conditions of Article 10 § 2 ECHR and did not amount to a violation.

The facts in *Salihu a.o. v. Sweden* are different. The applicants in this case took a series of relevant safety precautions, and there is no suggestion any risk was created. The Swedish Supreme Court indeed explicitly recognised that there had been *"no risk that the firearm would be used and that it was for a journalistic purpose"*. The decisive argument, echoed by the ECtHR, was that the breach of law was not necessary for the story: *"the question if it was easy to purchase a firearm could have been illustrated in other ways"*.

In the past, the ECtHR has stressed that judges should be careful not to *"substitute their own views for those of the press as to what technique of reporting should be adopted by journalists"* (see e.g. [Jersild v. Denmark](#), § 31). Against this background, the Court's failure to explain its assertion that the journalists could have made their point in another way seems surprising. It is not readily obvious that they could. The Swedish Supreme Court argued that the journalists' purpose had already been achieved when they received the offer to purchase the firearm. But this is not entirely convincing: at that point, there was still a possible doubt about the seriousness of the offer. Purchasing the firearm also allowed the journalists to take pictures proving and documenting their story.

One need not go so far as the rigorous advice given to trainee journalists: *"if your mother says she loves you, check it out"*. But verification before dissemination is a basic journalistic responsibility, which may sometimes come in conflict with domestic criminal law. As the ECtHR has stated, *"if the national courts apply an overly rigorous approach to the assessment of journalists' professional conduct, the latter could be unduly deterred from discharging their function of keeping the public informed"* (see e.g. [Kasabova v. Bulgaria](#), § 55). In this instance, the journalists were reporting on a matter of substantial public interest and appear to have acted in good faith, without causing the type of risk the Swedish Weapons Act aims to prevent. The journalists' criminal conviction and the fines imposed on them, while below the normal statutory level, may have a potential chilling effect on investigative journalism on issues of societal interest.

To what extent "check it out"-journalists should enjoy the protection of Article 10 in cases such as this remains a thorny but important issue. By leaving a wide margin of appreciation to the national authorities and especially by relying on the non-substantiated argument that other ways of journalistic reporting could also have demonstrated the easy availability of firearms, the Court has missed an opportunity for a more in-depth examination about this format of investigative journalism.

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